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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2000

ALLMERICA FINANCIAL LIFE INSURANCE AND ANNUITY COMPANY,

Petitioner,

v.

WILLIAM A. MILLER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal Arbitration Act and the National Association of Securities Dealers ("NASD") Code of Arbitration Procedure require the arbitration of an employment dispute between an NASD member insurance company and one of its agents who signed a "Form U-4" containing an agreement to arbitrate disputes with NASD members in accordance with NASD rules, as four federal circuit courts of appeals have held, or does the NASD Code of Arbitration Procedure's exception for "disputes involving the insurance business of any member which is also an insurance company" preclude arbitration of such employment disputes as a matter of law, as the Supreme Court of Alabama has held?

LIST OF PARTIES

Petitioner Allmerica Financial Life Insurance and Annuity Company was an Appellant in the Supreme Court of Alabama and a Defendant in the trial court.

Respondent William A. Miller was the Appellee in the Supreme Court of Alabama and the Plaintiff in the trial court.

Nowlin & Associates also was an Appellant in the proceedings before the Supreme Court of Alabama and a Defendant in the trial court.

CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH SUPREME COURT RULE 29.6

Petitioner Allmerica Financial Life Insurance and Annuity Company is a wholly owned subsidiary of First Allmerica Financial Life Insurance Company, and First Allmerica Life Insurance Company is a wholly owned subsidiary of Allmerica Financial Corporation.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Corporate Disclosure Statement in Accordance with Supreme Court Rule 29.6 ii

Table of Authorities vi

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Statutory and Regulatory Provisions Involved 2

Statement of the Case 5

I. Factual Background and Nature of the Claims 5

II. Motion to Compel Arbitration in Trial Court Presenting Federal Question 7

III. Appeal to the Supreme Court of Alabama and Its Declining to Follow the "Clear Majority" of Cases 8

Reasons for Granting the Writ 10

I. The Decision of the Supreme Court of Alabama in This Case Is in Conflict with the Decisions of Four Federal Circuit Courts of Appeals as well as Numerous Other Decisions. 11

II. The Supreme Court of Alabama's Decision Conflicts with This Court's Interpretation of the Federal Arbitration Act as Establishing a Broad Federal Policy Favoring Arbitration. 17

III. A Uniform Interpretation of the NASD Code of Arbitration Procedure Is Imperative. 19

A. The Supreme Court of Alabama's decision will cause different outcomes in similar cases solely dependent upon the court in which the case is pending — a result which is contrary to the intent of the FAA. 19

B. The Supreme Court of Alabama's decision conflicts with the NASD's national arbitration policy, the language of the NASD Code of Arbitration Procedure, and its drafting history. 20

Conclusion 26

Appendix A1

A. *Allmerica Fin. Life Ins. Co. v. Miller*, No. 1980529 (Ala. June 23, 2000) A1

B. *Miller v. Allmerica Fin. Life Ins. Co.*, No. CV-97-5389-ER (10th Jud. Cir. Ct. of Ala., Oct. 27, 1998) A14

C. *Metropolitan Life Ins. Co. v. McRae*, No. 96-7051 (11th Cir. July 31, 1997) (unpublished decision) A16

TABLE OF AUTHORITIES

Cases **Page No.**

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 7, 17-19

Allmerica Fin. Life Ins. Co. v. Miller,
No. 1980529, 2000 WL 804448,
2000 Ala. LEXIS 285 (Ala. June 23, 2000) 1

Anastasoff v. United States,
No. 99-3917EM,
2000 WL 1182813 (8th Cir. Aug. 22, 2000) 13

Armjo v. Prudential Ins. Co.,
72 F.3d 793 (10th Cir. 1995) 11, 14

AT&T Techs., Inc. v.
Communications Workers of Am.,
475 U.S. 643 (1986) 18

Battle v. Prudential Ins. Co.,
973 F. Supp. 861 (D. Minn. 1997) 15

Brannon v. Massachusetts Mut. Life Ins. Co.,
No. CIV A. 99-3497,
2000 WL 122241 (E.D. La. Jan. 31, 2000) 15

Cular v. Metropolitan Life Ins. Co.,
961 F. Supp. 550 (N.D. N.Y. 1997) 16

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 7

Farrand v. Lutheran Bhd.,
993 F.2d 1253 (7th Cir. 1993) 23, 24

Fastenberg v. Prudential Ins. Co.,
707 A.2d 20 (N.J. Super. Ct.
App. Div. 1998) 17

Financial House, Inc. v. Otten,
369 F. Supp. 105 (E.D. Mich. 1973) 21

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 7

Ex parte Hagan,
721 So. 2d 167 (Ala. 1998),
cert. dismissed, 119 S. Ct. 921 (1999) ..... passim

Hall v. MetLife Res.,
No. 94 Civ. 0358 (JFK),
1995 WL 258061 (S.D. N.Y. May 3, 1995) 16

Herko v. Metropolitan Life Ins. Co.,
978 F. Supp. 141 (W.D. N.Y. 1997) 15

In re Prudential Ins. Co.,
133 F.3d 225 (3rd Cir.),
cert. denied 119 S. Ct. 55 (1998) 11, 12

International Ass'n of Machinists v. Street,
367 U.S. 740 (1961) 2, 20

Jankausas v. Prudential Ins. Co.,
No. Civ. A. 97-985,
1997 WL 241143 (E.D. Pa. May 6, 1997) 15

Ex parte Jones,
628 So. 2d 316 (Ala. 1993) 7

Kidd v. Equitable Life Assurance Soc'y,
32 F.3d 516 (11th Cir. 1994) 11, 13, 24

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 18

Metropolitan Life Ins. Co. v. McRae,
121 F.3d 723 (11th Cir. 1997) 11, 13

Minnesota Mut. Life Ins. Co. v. Hagan,
119 S. Ct. 921 (1999) 8

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 7, 18, 19

Moses H. Cone Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 18, 24

Mouton v. Metropolitan Life Ins. Co.,
147 F.3d 453 (5th Cir. 1998) 11, 14

Neary v. Prudential Ins. Co.,
No. 3:96CV1513 (AHN),
1997 WL 114789 (D. Conn. February 24, 1997) 16

Northwestern Mut. Life Ins. Co. v. Stinnett,
698 N.E.2d 339 (Ind. Ct. App. 1998) 16

Palmer-Scopetta v. Metropolitan Life Ins. Co.,
37 F. Supp. 2d 1364 (S.D. Fla. 1999) 15

Paul Revere Variable Annuity Ins. Co. v. Thomas,
66 F. Supp. 2d 217 (D. Mass. 1999) 15

Paul Revere Variable Annuity Ins. Co. v. Zang,
81 F. Supp. 2d 227 (D. Mass. 2000) 15

Perry v. Thomas,
482 U.S. 483 (1987) 7

Pitter v. Prudential Life Ins. Co.,
906 F. Supp. 130 (E.D. N.Y. 1995) 16

Prudential Ins. Co. v. Shammas,
865 F. Supp. 429 (W.D. Mich. 1993) 16

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220 (1987) 18, 21

Southland Corp. v. Keating,
465 U.S. 1 (1984) 17

Trumbetta v. Metropolitan Life Ins. Co.,
Civ. A. No. 94-3275,
1994 WL 481152 (E.D. Pa. 1994) 16

Vitone v. Metropolitan Life Ins. Co.,
943 F. Supp. 192 (D. R.I. 1996) 16

Weinstein v. Equitable Life Assurance Soc'y,
No. CIV. A. 96-CV-3614,
1996 WL 557321 (E.D. Pa. Sept. 26, 1996) 16

Wojcik v. Aetna Life Ins. & Annuity Co.,
901 F. Supp. 1282 (N.D. Ill. 1995),
clarified by 916 F. Supp. 729 (N.D. Ill. 1996) 16

Statutes and Rules

9 U.S.C. § 2 (1994) 2, 17

9 U.S.C. § 16 (1994) 8

15 U.S.C. § 78o-3 (1994) 2, 20

28 U.S.C. § 1257(a) (1994) 1

42 U.S.C. § 1981 (1994) 12, 16

Ala. Code § 8-1-41 (1993) 7

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... passim

1938 Maloney Act Amendments to the Securities and Exchange Act of 1934, 52 Stat. 1070 ..... 2, 20

Title VII of the Civil Rights Act of 1964 ..... 12, 14-16

Supreme Court Rule 29.6 ii

Supreme Court Rule 46.1 8

11th Cir. R. 36-2 13

Other Authorities

NASD Manual, Corporate Organization, By-laws art. VII, § 1(a) (CCH) (1996) 3

NASD Manual, Administration (CCH) (1996) 2, 21

NASD Manual, Code of Arbitration Procedure (CCH) § 10101 (1996) 3-6, 9-10, 13, 19, 21-25

NASD Manual, Code of Arbitration Procedure (CCH) § 10201 (1996) 4, 5, 23, 25

NASD Manual, Code of Arbitration Procedure (CCH) § 10202 (1996) 23, 25

Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35299 (June 22, 1998) 3

Order Approving Proposed Rule Change Relating to the Scope of NASD Arbitration Code of Procedure, 58 Fed. Reg. 45932 (Aug. 25, 1993), ... 23, 24

NASD Proposed Rule Change, 44 Fed. Reg. 75255 (proposed Oct. 18, 1979) ... 21, 22

Proposed Rule Change by NASD Relating to Amendments to Code of Arbitration Procedure, 52 Fed. Reg. 9232 (proposed March 5, 1987) 22

Proposed Rule Change by NASD Relating to Enforcement of Arbitrators' Orders Under the NASD Code of Arbitration Procedure, 58 Fed. Reg. 39070 (proposed June 11, 1993) 23

Securities Exchange Act of 1934
Release No. 34-16860,
1980 WL 27003 (S.E.C.) (May 30, 1980) 21

PETITION FOR WRIT OF CERTIORARI

Allmerica Financial Life Insurance and Annuity Company ("Allmerica") respectfully petitions this Court to issue a writ of certiorari to review the June 23, 2000, judgment of the Supreme Court of Alabama denying Allmerica the right to arbitrate the claims made against it by Respondent William A. Miller.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama appears in the Appendix to the Petition at Appendix A, page A1, and will be, but has not yet been, published in West's Southern Reporter (second series), the official reporter for Alabama decisions. It has been unofficially published in electronic formats, including Westlaw at 2000 WL 804448, Lexis at 2000 Ala. LEXIS 285, and the Internet at http://www.wallacejordan.com/1980529.htm. The order of the Circuit Court of Jefferson County, Alabama, denying Allmerica's Motion to Compel Arbitration and for Stay Pending Arbitration is printed in the Appendix to the Petition at Appendix B, page A14, and is unpublished.

JURISDICTION

The Supreme Court of Alabama issued its decision affirming the trial court's denial of Allmerica's motion to compel arbitration on June 23, 2000. No application for rehearing was filed. A copy of the Supreme Court of Alabama's decision appears at Appendix A, page A1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1994).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 (1994), provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The National Association of Securities Dealers ("NASD") was created under the authority granted by the 1938 Maloney Act amendments to the Securities Exchange Act of 1934. 52 Stat. 1070, 15 U.S.C. § 78*o*-3; *International Ass'n of Machinists v. Street*, 367 U.S. 740, 809 n.16 (1961); NASD Manual, Administration (CCH) 151 (1996).[1] The NASD

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[1] The 1996 version of the NASD Manual is the one in effect at the time this action was filed. However, there do not appear to be any material changes between the 1996 version and the current version that concern the issues in this case. The 1998 amendment to the NASD Code of Arbitration Procedure provides that associated

(continued...)

adopted a Code of Arbitration Procedure in accordance with Article VII, § 1(a) of its by-laws. Section 10101 of the NASD Code of Arbitration provides:

> This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:
>
> (a) between or among members;
>
> (b) between or among members and associated persons;

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[1] (...continued)
persons will not be required to arbitrate statutory employment discrimination claims, but that other employment-related disputes will still be subject to mandatory arbitration. Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35299 (June 22, 1998). This amendment became effective on January 1, 1999, for claims filed on or after that date. Miller's claims were filed in 1997 and do not involve any statutory employment discrimination claims. The current version of the NASD Manual is available over the Internet at http://secure.nasdr.com.

> (c) between or among members or associated persons and public customers, or others; and
>
> (d) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

NASD Manual, Code of Arbitration Procedure (CCH) § 10101 at 7511-12 (1996) (hereinafter "NASD Code"). In addition, § 10201(a) of the NASD Code provides as follows:

> (a) Any dispute, claim or controversy eligible for submission under Part 1 of this Code between or among members and/or associated persons and/or certain others, raising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) by and with such member, shall be arbitrated under this Code, at the instance of:
>
> . . . .

> (2) a member against a person associated with a member or a person associated with a member against a member . . . .

NASD Code § 10201, at 7541.

STATEMENT OF THE CASE

I. Factual Background and Nature of the Claims

This case concerns the enforceability of an arbitration provision in a Uniform Application for Securities Industry Registration (Form U-4) in a dispute involving an agent's employment. The facts material to the issues presented in this petition are not in dispute, although the parties disagree as to the characterization of the Plaintiff's claims and as to the lower courts' interpretation of the "insurance business" exception in § 10101 of the NASD Code of Arbitration ("NASD Code").

William A. Miller was hired by Allmerica Financial Life Insurance and Annuity Company ("Allmerica") (then known as SMA Life Assurance Company) in 1983. In 1984, Miller executed a Form U-4 in order to register with the National Association of Securities Dealers ("NASD") to sell variable life and annuity contracts. The Form U-4 signed by Miller contains the following provision:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organization with which I register, as indicated in Question 8.

The organization with which Miller registered as indicated in "Question 8" was the NASD. The arbitration rules of the NASD require "the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company . . . between or among members and associated persons . . . ." NASD Code § 10101. Allmerica is a member of the NASD. Miller is an "associated person" as those terms are defined by the NASD Bylaws.

In June 1997, Miller terminated his employment with Allmerica. In September 1997, Miller filed a civil action in the Circuit Court of Jefferson County, Alabama, against Allmerica and the local general agency through which he worked, Nowlin & Associates ("Nowlin").

Miller's claims stem from his employment as an agent with Allmerica through Nowlin. Miller contends that Allmerica and Nowlin misrepresented aspects of his employment and compensation, and he also contends that Allmerica committed other forms of misconduct with regard to his employment. Specifically, Miller contends he was "strongly encouraged" to sell Payroll Exceptional Life ("PEL") products, that "he was assured he would be compensated based on his production, including continued commissions and vesting," that Allmerica sold the PEL products to American Heritage Life Insurance Company in September 1995, and that Allmerica and Nowlin falsely "represented . . . that the PEL customers were his clients, they would continue to be his clients and . . . he would continue to collect commissions, income and vesting." Based on these allegations, Miller characterizes his causes of action as follows: breach of contract, deceit, misrepresentation, negligence, recklessness, wantonness, fraudulent deceit, suppression, and intentional interference with business relations. He does not make any claims that Allmerica breached any contractual or

other obligation to any policyholder, nor does he claim that Allmerica violated any insurance law or regulation. (R. at 2-15 (Compl.)).[2]

II. Motion to Compel Arbitration in Trial Court Presenting Federal Question

In response to Miller's Complaint, Allmerica filed a detailed Motion to Compel Arbitration and for Stay Pending Arbitration, asking the court to compel arbitration and to stay all further proceedings "pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ('FAA')," and in accordance with the terms of the Form U-4 signed by Miller and the NASD Code of Arbitration Procedure. (R. at 18-68 (Mot. to Compel Arbitration)). The motion also cited as authority this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Perry v. Thomas*, 482 U.S. 483 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). But for the application of the Federal Arbitration Act ("FAA"), the arbitration agreement would not be enforceable in Alabama state courts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) ("*Terminix*"); *Ex parte Jones*, 628 So. 2d 316, 317 (Ala. 1993); Ala. Code § 8-1-41 (1993).

The trial court denied the motion to compel arbitration, relying on the Supreme Court of Alabama's decision in *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998), *cert. dismissed*, 119

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[2] Citations to the record on appeal before the Supreme Court of Alabama will be in conformity with P.7 (pp. 18-19) and T.8 (pp. 307-08) of *The Bluebook: A Uniform System of Citation* (17th ed. 2000).

S. Ct. 921 (1999),[3] a case in which the court denied an insurance company's motion to compel arbitration of an employment dispute between it and its employee under the NASD Code. (App. at A14 (trial court's order)). Allmerica and Nowlin filed a motion to vacate, alter, or amend the order denying their motion to compel arbitration, and that motion was also denied.

III. Appeal to the Supreme Court of Alabama and Its Declining to Follow the "Clear Majority" of Cases

Allmerica and Nowlin both filed appeals to the Supreme Court of Alabama under the authority of 9 U.S.C. § 16, which gives a right of appeal from an order denying a motion or petition to compel arbitration. In its brief to the Supreme Court of Alabama, Allmerica again raised federal issues and argued that the Supreme Court of Alabama's "construction of the 'insurance business' exception of the NASD Code in *Hagan* was erroneous and should be overruled because it is contrary to the strong federal policy favoring arbitration that is embodied in the Federal Arbitration Act, is contrary to the NASD Code and its history, is contrary to the weight of authorities from other jurisdictions, and is contrary to the congressional intent that the same results regarding an arbitration agreement be reached in both state and federal courts in similar cases."

During the pendency of the appeal, Allmerica supplemented its briefs with letters informing the court of additional federal cases released after the submission of briefs which supported Allmerica's position that Miller's claims against it were due to be arbitrated. Some of these cases cited

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[3] The dismissal in *Hagan* was by agreement of the parties in accordance with Supreme Court Rule 46.1 after a settlement of the case. *Minnesota Mut. Life Ins. Co. v. Hagan*, 119 S. Ct. 921 (1999).

Hagan and were critical of the Supreme Court of Alabama's reasoning.

The Supreme Court of Alabama affirmed the trial court's denial of Allmerica's motion to compel arbitration by a vote of 6-3. (App. at A1-A12.) The court's opinion quoted extensively from its previous decision in *Hagan*, including a statement that "'the employment of insurance agents by an insurance company involves the insurance business of the insurance company.'" (App. at A9 (quoting *Hagan*).) The opinion then noted Allmerica's request to overturn *Hagan* and cited 21 cases on which this request was based, including decisions of the U.S. courts of appeals for the Third, Fifth, Tenth, and Eleventh circuits. The court followed this citation of significant authority, most of which were federal cases, with one sentence stating: "We are not persuaded that we should overrule *Hagan*." (App. at A12.)

Chief Justice Hooper, Justice Maddox, and Justice See dissented concerning the denial of arbitration as to Allmerica (but not as to Nowlin). Justice See, joined by the other dissenters, wrote:

> In denying Allmerica's motion to compel arbitration, the trial court relied on *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998). In *Hagan*, this Court held that an employment dispute with an insurance company necessarily involves the insurance business of that company and therefore comes within the insurance business exception under § 10101 of the Code of Arbitration of the National Association of Securities Dealers. The holding of *Hagan* is contrary to the clear majority of cases, as cited in the main opinion. I would overrule *Hagan* and, in accordance with the clear majority of authority, hold that plaintiff

> William A. Miller's employment dispute with Allmerica does not involve the business of insurance and is therefore arbitrable.

(App. at A12-A13 (See, J., concurring in part and dissenting in part) (footnote omitted)).

Thus, the Supreme Court of Alabama was presented with the "clear majority" of cases — most of which were federal cases and four of which were decisions of U.S. circuit courts of appeals — but was not persuaded that its previous interpretation of the insurance business exception of § 10101 of the NASD Code, which conflicts with that "clear majority" of cases, was erroneous.

Because the issue had been before the Supreme Court of Alabama in *Hagan* and in the present case, and because Allmerica had presented the great weight of contrary authority to the court, it was clear to Allmerica that there were no additional arguments to be presented which could persuade the court to change its decision. Thus, Allmerica did not file an application for rehearing with the Supreme Court of Alabama, deciding instead to proceed with this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Alabama's decision conflicts with the decisions of four federal circuit courts of appeals, as well as numerous other federal courts. The decision in the present case is also in conflict with the strong federal policy favoring arbitration as established by the Federal Arbitration Act and this Court's decisions interpreting it. The decision below also will cause different outcomes in similar cases depending on the court in which the case is filed, which is contrary to the intent of the FAA, and it is also contrary to the language and drafting

history of the NASD Code. Therefore, to resolve the conflict between the Supreme Court of Alabama and four federal circuit courts of appeals, to effectuate this Court's interpretation of the FAA's strong federal policy favoring arbitration, and to clarify the meaning and intent of the language of the NASD Code of Arbitration, this Court should grant this petition for writ of certiorari.

I. The Decision of the Supreme Court of Alabama in This Case Is in Conflict with the Decisions of Four Federal Circuit Courts of Appeals as well as Numerous Other Decisions.

The Supreme Court of Alabama's overly broad interpretation of the "insurance business" exception directly conflicts with the decisions of at least four federal circuit courts of appeals. *See Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *In re Prudential Ins. Co.*, 133 F.3d 225 (3rd Cir.), *cert. denied* 119 S. Ct. 55 (1998); *Armjo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995); *Kidd v. Equitable Life Assurance Soc'y*, 32 F.3d 516 (11th Cir. 1994); *see also Metropolitan Life Ins. Co. v. McRae*, 121 F.3d 723 (11th Cir. 1997) (table of decisions without published opinions) (copy of unpublished decision is attached at Appendix C, page A16). Under the rationale of any of these federal circuit court decisions, Allmerica's motion to compel arbitration should have been granted.

The Third Circuit's decision in *In re Prudential Insurance Co.* concerned the plaintiffs' various state-law claims — "employment, contractual, and tortious in nature" — and federal RICO claims, all of which were based on "alleg[ations] that Prudential took adverse employment action against them in retaliation for their refusal to participate in the company's insurance sales fraud." *Prudential*, 133 F.3d at 227, 231. The court recognized that the plaintiffs' claims were undisputedly

employment related but also necessarily implicated "the legality of certain insurance practices" and "involve[d] Prudential's insurance business in the dispute." *Prudential,* 133 F.3d at 231.

The Third Circuit observed that the NASD Code and its drafting history were unclear as to the extent that insurance business must be involved in an employment dispute before the exception is triggered. *Prudential,* 133 F.3d at 233. The court concluded "[t]here is only one clear expression of intent [in the NASD Code]—that employment disputes are subject to arbitration while 'intrinsically insurance' claims are not." *Prudential,* 133 F.3d at 234. The court decided that based on the federal policy favoring arbitration, any doubts concerning the scope of the exception should be resolved in favor of arbitration and, therefore, reversed the district court's decision denying Prudential's motion to compel arbitration. *Prudential,* 133 F.3d at 234-35. This is in direct conflict with the decision of the Supreme Court of Alabama in the present case.

In fact, it is even more apparent in the present case than it was in *Prudential* that the insurance business exception does not prevent arbitration. The resolution of Miller's claims would not require the same type of extensive evaluation of Allmerica's insurance practices because Miller is not claiming, as were the plaintiffs in *Prudential,* that Allmerica committed insurance fraud on customers or violated any insurance laws. Rather, Miller is only claiming that Allmerica made misrepresentations to him concerning the continuation of certain client relationships and continuation of commissions.

The Eleventh Circuit's decision in *Kidd v. Equitable Life Assurance Society* also conflicts with the Supreme Court of Alabama's position. *Kidd* involved claims of race discrimination under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981. The plaintiffs had previously signed the Form U4 to register with the NASD to sell securities for defendant Equitable Life Assurance Society and an Equitable subsidiary. Equitable moved to compel arbitration of those claims but the district court denied the

motion. In interpreting both pre-1993 and post-1993 versions of the NASD Code section at issue in the present case, the Eleventh Circuit did not find that the "insurance business" exception applied, and it reversed the lower court's denial of arbitration. *Kidd*, 32 F.3d at 519-20. The Eleventh Circuit did not consider the fact that Equitable is an insurance company sufficient to trigger the exception. The court said that "Equitable's personnel practices do not constitute a dispute over its 'insurance business.'" *Kidd*, 32 F.3d at 519 n.5. Thus, *Kidd* is in conflict with the Supreme Court of Alabama's holding that "'the employment of insurance agents by an insurance company involves the insurance business of the insurance company'" and thereby invokes the "insurance business" exception of § 10101 of the NASD Code. (App. at A9 (quoting *Hagan*).)

The Eleventh Circuit has also decided at least one other case involving the "insurance business" exception. *Metropolitan Life Ins. Co. v. McRae*, 121 F.3d 723 (11th Cir. 1997) (table of decisions without published opinions) (copy of unpublished opinion attached at Appendix C, page A16).[4] *McRae*, an appeal from the Northern District of Alabama, is remarkably similar to the present case. In *McRae*, the defendant hired the plaintiffs to market a particular type of life insurance product, but approximately 18 months later, after the plaintiffs had obtained between 250 and 300 applications, the defendant discontinued the product and refunded all previously paid

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[4] Eleventh Circuit Rules permit citation of unpublished decisions. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not binding precedent. They may be cited as persuasive authority . . . ."). Additionally, a recent Eighth Circuit decision held that rules prohibiting the citation of unpublished opinions and stating that they are not binding precedent are unconstitutional as violations of Article III of the U.S. Constitution. *Anastasoff v. United States*, No. 99-3917EM, 2000 WL 1182813 (8th Cir. Aug. 22, 2000), *available at* http://www.ca8.uscourts.gov/opndir/00/08/993917P.pdf.

premiums. The plaintiffs filed a lawsuit alleging various types of fraud and breach of contract and sought "damages based on lost commissions and foregone business opportunities." Like Miller in the present case, the plaintiffs had signed Form U-4 agreements. The district court granted the defendant's motion to compel arbitration based on the NASD Code. The Eleventh Circuit affirmed, relying on *Kidd*, and held "that the insurance business exception is inapplicable to Appellants' dispute with MetLife, because the dispute arises out of their employment relationship with MetLife." (App. at A18.) Thus, *McRae* is also directly in conflict with the Supreme Court of Alabama's decision in the present case.

The Fifth Circuit's opinion in *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998), and the Tenth Circuit's opinion in *Armjo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995), are also contrary to the Supreme Court of Alabama's decision in this case. *Mouton* and *Armjo* both concern discrimination claims by former insurance sales agents. *Mouton*, 147 F.3d at 454; *Armjo*, 72 F.3d at 795. Both the Fifth and Tenth Circuits addressed the federal policy favoring arbitration and the history of the NASD Code. *Mouton*, 147 F.3d at 455-56; *Armjo*, 72 F.3d at 797-99. Both courts then rejected the contention that the plaintiffs' claims fell within the "insurance business" exception; instead, the courts found that the claims were employment related and therefore arbitrable under the NASD Code. *See Mouton*, 147 F.3d at 457 ("Mouton's Title VII claims involve Metropolitan's obligations as an employer rather than an insurer."); *Armjo*, 72 F.3d at 800 ("[T]he dispute as framed by the Plaintiffs is predicated upon the civil rights laws, not the insurance laws, and they are predicated on Prudential's role as an employer rather than as an insurer."). Moreover, unlike the Supreme Court of Alabama, the Fifth and Tenth Circuits correctly recognized that an expansive interpretation of the exception renders any agreement to arbitrate pursuant to the NASD Code meaningless to insurance companies. *Id.* A construction rendering an

arbitration provision meaningless violates the FAA and cases construing the FAA. Thus, the Supreme Court of Alabama's decision in the present case is in conflict with decisions of the Third, Fifth, Tenth, and Eleventh circuits.

The Supreme Court of Alabama's decision is also in conflict with numerous federal district court decisions and some other state court decisions. These decisions demonstrate both that the issue raised by Allmerica is common and that the resolution of the issue by the Supreme Court of Alabama is erroneous. Conflicting decisions of federal district courts or other state courts include the following 18 cases: *Paul Revere Variable Annuity Ins. Co. v. Zang*, 81 F. Supp. 2d 227 (D. Mass. 2000) (involving claims of employees terminated after a merger and specifically disagreeing with the Supreme Court of Alabama's decision in *Hagan*); *Brannon v. Massachusetts Mut. Life Ins. Co.*, No. CIV A. 99-3497, 2000 WL 122241 (E.D. La. Jan. 31, 2000) (involving an employee's claim for disability insurance, specifically disagreeing with *Hagan*, and stating that "a case which simply involves an insurance company in an employment dispute does not trigger the [insurance business] exception"); *Paul Revere Variable Annuity Ins. Co. v. Thomas*, 66 F. Supp. 2d 217 (D. Mass. 1999) (concerning claims by employees terminated after a merger and stating that that *Hagan* "is inapposite to the extensive authority reaching the opposite conclusion"); *Palmer-Scopetta v. Metropolitan Life Ins. Co.*, 37 F. Supp. 2d 1364 (S.D. Fla. 1999) (determining that the plaintiff's sexual harassment claims concerned MetLife's "'role as an employer rather than as an insurer'" and, as such, held that those claims did not fall within the "insurance business" exception); *Herko v. Metropolitan Life Ins. Co.*, 978 F. Supp. 141 (W.D. N.Y. 1997) (holding that insurer's former employee's Title VII claims were due to be arbitrated); *Battle v. Prudential Ins. Co.*, 973 F. Supp. 861 (D. Minn. 1997) ("That the facts underlying the Plaintiff's claims may involve allegations of insurance practices, does not bring Plaintiff's claims within the insurance exception."); *Jankausas v.*

Prudential Ins. Co., No. Civ. A. 97-985, 1997 WL 241143 (E.D. Pa. May 6, 1997) ("Breach of an employment agreement . . . and failure to pay wages are paradigm employment concerns, no matter how much insurance Prudential may sell or how it may sell it."); *Cular v. Metropolitan Life Ins. Co.*, 961 F. Supp. 550 (N.D. N.Y. 1997) (compelling arbitration of employment-related claims); *Neary v. Prudential Ins. Co.*, No. 3:96CV1513 (AHN), 1997 WL 114789 (D. Conn. February 24, 1997) (holding that the "insurance business" exception failed to apply); *Vitone v. Metropolitan Life Ins. Co.*, 943 F. Supp. 192 (D. R.I. 1996) ("[T]he main thrust of this claim is to challenge a negative employment decision and other conduct during the employment relationship, not to examine MetLife's insurance practices."); *Weinstein v. Equitable Life Assurance Soc'y*, No. CIV. A. 96-CV-3614, 1996 WL 557321 (E.D. Pa. Sept. 26, 1996) ("Courts have held that the insurance business exception does not apply to employment-related disputes merely because the dispute involves an insurance company."); *Pitter v. Prudential Life Ins. Co.*, 906 F. Supp. 130 (E.D. N.Y. 1995) (compelling arbitration of plaintiff's Title VII and § 1981 claims); *Wojcik v. Aetna Life Ins. & Annuity Co.*, 901 F. Supp. 1282 (N.D. Ill. 1995), *clarified by* 916 F. Supp. 729 (N.D. Ill. 1996) (holding that plaintiff's claims for conspiracy and intentional interference with business practices were due to be arbitrated); *Hall v. MetLife Res.*, No. 94 Civ. 0358 (JFK), 1995 WL 258061 (S.D. N.Y. May 3, 1995) ("Courts have consistently held that claims arising out of an employment relationship . . . are within the scope of the Form U-4 and the NASD arbitration provision."); *Trumbetta v. Metropolitan Life Ins. Co.*, Civ. A. No. 94-3275, 1994 WL 481152 (E.D. Pa. 1994) ("This is not a claim arising from a dispute about the insurance aspect of MetLife's business."); *Prudential Ins. Co. v. Shammas*, 865 F. Supp. 429 (W.D. Mich. 1993) ("The conduct complained of had nothing to do with the insurance aspect of Prudential's insurance business."); *Northwestern Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339 (Ind. Ct. App. 1998)

("Stinnett's claims ultimately involve significant aspects of the employment relationship and resolution depends on the parties broker-employer relationship."); *Fastenberg v. Prudential Ins. Co.*, 707 A.2d 209 (N.J. Super. Ct. App. Div. 1998) (compelling arbitration of employee's wrongful discharge and defamation claims).

The majority of the Supreme Court of Alabama cited most of these cases in their opinion in the present case but stated merely that "[w]e are not persuaded that we should overrule *Hagan*." Apparently, only a ruling from this Court will persuade them of their error. Therefore, this Court should grant this petition for writ of certiorari.

II. The Supreme Court of Alabama's Decision Conflicts with This Court's Interpretation of the Federal Arbitration Act as Establishing a Broad Federal Policy Favoring Arbitration.

Section 2 of the FAA codifies the federal policy favoring the enforcement of arbitration agreements:

> A written provision in any . . . contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid irrevocable, and enforceable . . . ."

9 U.S.C. § 2. This Court has specifically found that with the passage of the FAA, Congress "intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements" and create "a substantive rule applicable in state as well as federal courts." *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (holding that FAA preempted California state law); *accord Terminix*, 513 U.S. at 271-72. The very "purpose

of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Terminix*, 513 U.S. at 270.

In interpreting the language and congressional intent of the FAA, this Court has consistently determined that the Act "establishes a federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). One of the cardinal principles of interpretation of the FAA is that any doubts concerning the scope of arbitration must be resolved in favor of arbitration.

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration .... **The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or like defense to arbitrability.**

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)) (emphasis added); *see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (holding that ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration). This Court also has emphasized that "'[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of*

Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).

However, the Supreme Court of Alabama's decision in the present case appears to ignore this federal policy by interpreting the "insurance business" exception contained in § 10101 of the NASD Code in an overly broad manner. Even if the Supreme Court of Alabama found that the NASD Code was ambiguous as to whether disputes between insurance company NASD members and their employees were due to be arbitrated, it was required, as a matter of federal law, to resolve any doubts concerning the scope of the arbitrable issues in favor of arbitration. *Mitsubishi Motors Corp.*, 473 U.S. at 626.

Therefore, the Supreme Court of Alabama's decision in the present case has failed to abide by this Court's precedents by rejecting the federal policy underlying the FAA. This Court should grant this petition for writ of certiorari to effectuate the FAA's strong federal policy favoring arbitration and this Court's precedents recognizing that policy.

III. A Uniform Interpretation of the NASD Code of Arbitration Procedure Is Imperative.

A. The Supreme Court of Alabama's decision will cause different outcomes in similar cases solely dependent upon the court in which the case is pending — a result which is contrary to the intent of the FAA.

This Court has examined the legislative intent of the FAA and "decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Terminix*, 513 U.S. at 272 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984)). The Supreme Court of Alabama's decision in the present case, which is contrary to the decisions of a majority of federal circuit

courts of appeals as well as numerous other courts, violates this Court's finding concerning the intent of the FAA.

That Alabama is within one of the federal circuits that has addressed this issue (the Eleventh) and reached a decision that is in conflict with the Supreme Court of Alabama's decision in this case makes the decision in the present case especially problematic. If the Supreme Court of Alabama's decision is allowed to stand, whether employment disputes arising in Alabama between employees who signed U-4 Forms and NASD members who are also insurance companies will be required to be arbitrated depends on whether the action is pending in an Alabama state court or an Alabama federal court. Such a result will only encourage forum shopping by both plaintiffs and defendants. Whether a case is arbitrated will be determined by whether there is complete diversity and more than $75,000 in controversy or whether there is a federal issue involved.

In fact, but for the naming of a non-diverse defendant (*i.e.*, Nowlin), the present case could have been removed to federal court where, under the Eleventh Circuit precedents of *Kidd* and *McRae*, arbitration would already have been compelled. Whether an arbitration provision is enforced should not depend on these kinds of factors. Instead, this Court should alleviate this disparity and effectuate the intent of the FAA by overruling the Supreme Court of Alabama's overly broad interpretation of the "insurance business" exception of the NASD Code.

B. The Supreme Court of Alabama's decision conflicts with the NASD's national arbitration policy, the language of the NASD Code of Arbitration Procedure, and its drafting history.

The NASD was established under the authority of the 1938 Maloney Act Amendments to the Securities and Exchange Act of 1934. 52 Stat. 1070, 15 U.S.C. § 78*o*-3; *International Ass'n*

of Machinists v. Street, 367 U.S. 740, 809 n.16 (1961); NASD Manual, Administration (CCH) 151 (1996). The NASD operates subject to oversight by the Securities and Exchange Commission ("SEC"). *Id.* The SEC must approve any rule change by the NASD, and the SEC has authority to "'abrogate, add to, and delete from'" the rules in the NASD Code. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233-36 (1987). As such, the SEC has virtually plenary authority over the arbitration rules adopted by the NASD. *See id.*

The NASD first adopted a Code of Arbitration Procedure in 1968. *Financial House, Inc. v. Otten*, 369 F. Supp. 105, 106-07 (E.D. Mich. 1973). On October 18, 1979, the NASD filed with the SEC a proposed rule change to be incorporated in its Code of Arbitration Procedure. NASD Proposed Rule Change, 44 Fed. Reg. 75255 (proposed Oct. 18, 1979). Before the rule change, disputes had to be "securities related" in order to be arbitrable. *Id.* However, under the proposal which was adopted in 1980, the "securities related" requirement was removed. The NASD noted:

> **The phrase "securities related" has been deleted before "dispute," [in § 10101,] so that any dispute, claim or controversy arising out of or in connection with the business of any member may now be arbitrated.** This change, which was made to conform to the uniform code, will make arbitrable certain disputes involving a member's business which were not previously eligible for arbitration.

44 Fed. Reg. at 75255 (emphasis added); *see* Securities Exchange Act of 1934 Release No. 34-16860, 1980 WL 27003 (S.E.C.) (May 30, 1980) (approving proposed rule change).

The Supreme Court of Alabama's decision in the present case and in *Hagan* held that § 10101 of the NASD Code "is

intended to require arbitration of disputes regarding the securities business of its members." (App. at A6 (quoting *Hagan*).) However, the aforementioned amendment makes clear that disputes are subject to arbitration under § 10101 regardless of whether they are securities related.

The 1980 rule change also "added an exception [to § 10101] which would exclude from arbitration 'disputes involving the insurance business of any member which is also an insurance company.'" 44 Fed. Reg. at 75255. The NASD expressed that its rationale for creating this "insurance business" exception was to avoid arbitrating "insurance-only" and "intrinsically insurance" disputes, stating:

> [T]he number of **insurance-only** claims involving insurance companies is so disproportionately large in relation to their securities business that to include such claims would unduly burden the arbitration system. In addition, the inclusion of such claims could result in a requirement to arbitrate matters that are **intrinsically insurance** . . . .

44 Fed. Reg. at 75255 (emphasis added).

In 1987, the NASD proposed another rule change which recognized that the NASD Code required arbitration of employment disputes. Proposed Rule Change by NASD Relating to Amendments to Code of Arbitration Procedure, 52 Fed. Reg. 9232 (proposed March 5, 1987). The change precluded NASD members from requiring associated persons to waive their right to arbitration. *Id.* The NASD's concern was that such waivers "would have the effect of denying registered representative access to the NASD's arbitration facilities in case of an **employment dispute** between them and a member firm . . . ." *Id.* (emphasis added).

Although the NASD recognized the arbitrability of employment disputes in 1987, it actually amended the NASD

Code in 1993 to reflect the scope of that arbitrability.[5] After the 1993 amendment, §§ 10101 and 10201 of the NASD Code specifically allow for arbitration of disputes "arising out of the employment or termination of employment of associated persons with any member."[6]

Section 10202, which involves the composition of arbitration panels, was also amended in 1993. 58 Fed. Reg. at 45932. That provision limits the composition of arbitration panels "[i]n disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions." *Id.*

The only federal circuit court decision to hold that employment disputes were not due to be arbitrated is the Seventh Circuit's decision in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253 (7th Cir. 1993), which interpreted a pre-1993 version of the NASD Code. This case prompted the 1993 amendment to the NASD Code to clarify that employment disputes were required to be arbitrated under the NASD Code. In its Order Approving Proposed Rule Change Relating to the Scope of NASD Code, 58 Fed. Reg. 45932 (Aug. 25, 1993), the NASD cited *Farrand* as one of the factors prompting the rule change. The change was intended "to clarify that disputes, claims, or controversies arising out of the employment or

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[5] *See* Proposed Rule Change by NASD Relating to Enforcement of Arbitrators' Orders Under the NASD Code, 58 Fed. Reg. 39070 (proposed June 11, 1993); Order Approving Proposed Rule Change Relating to the Scope of the NASD Code, 58 Fed. Reg. 45932 (Aug. 25, 1993).

[6] It is undisputed that the 1993 amended versions of § 10101 and § 10201, rather than any earlier versions of those sections, are the NASD Code provisions applicable for determining the arbitrability of Miller's claims in the present case.

termination of employment of an associated person are eligible for submission to arbitration" and "to ensure that the arbitration of industry employment disputes may be compelled at the instance of one of the parties to the dispute." 58 Fed. Reg. at 45932. The Eleventh Circuit in *Kidd* was also critical of the Seventh Circuit's analysis in *Farrand,* stating that the Seventh Circuit acknowledged that it was not unreasonable to interpret the pre-amendment NASD Code to require arbitration of employment disputes and not to do so was contrary to this Court's admonition in *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S.1,24-25 (1983), that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Kidd,* 32 F.3d at 519 & n.6. The Eleventh Circuit was also critical of the Seventh Circuit's construction of the pre-1993 NASD Code's language. *Id.* at 519-20.

Based on the rejection of *Farrand* and on these amendments and related filings by the NASD in 1980, 1987, and 1993, the NASD specifically expressed its intent that employment disputes are to be arbitrable, while disputes that are intrinsically about insurance are excepted from arbitration. However, the decisions of the Supreme Court of Alabama in the present case and in *Hagan* negate this intention. The Supreme Court of Alabama concluded that "the [insurance business] exception of § 10101 applies to members who are insurance companies." (App. at A6.) Under that holding, the mere fact that a dispute involves an insurance company will automatically preclude arbitration. In short, according the Supreme Court of Alabama, NASD member insurance companies will be unable to arbitrate disputes with their employees who are associated persons. This is totally inconsistent with the NASD's clearly stated rationale for the "insurance business" exception, *i.e.*, not arbitrating "insurance-only" and "intrinsically insurance" disputes.

It is evident that the dispute in the present case is not an "intrinsically insurance" dispute. Miller's claims simply are based on his employment contract and alleged oral promises

and representations about terms of his employment and compensation. Miller's claims are employment related and fall squarely within the parameters of disputes arbitrable under § 10101 and § 10201 of the NASD Code.

The amendment to § 10202 of the NASD Code also supports this conclusion. That provision implicitly recognizes that "disputes involving **employment contracts**, promissory notes or receipt of commissions" are arbitrable. NASD Code § 10202 (emphasis added). Miller contends that Allmerica breached his employment contract. Miller also claims that in relying upon representations regarding his sales, he lost customers and commissions. Even though § 10202 is not directly at issue in this case, the language contained therein demonstrates that the NASD recognizes that claims like Miller's are arbitrable.

In sum, the Supreme Court of Alabama's decision in the present case is inconsistent with the NASD's national rules on arbitration and the drafting history of those rules. That decision undermines a national, uniform interpretation and application of the NASD's arbitration rules and policy. This Court should grant this petition for certiorari to clarify the proper interpretation of the NASD Code of Arbitration Procedure's insurance business exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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